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IN THE HIGH COURT OF DELHI AT NEW DELHI

PRONOUNCED ON:16.11.2012

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**LPA No.748//2012 &
CM Nos.19171-19174/2012**

MR. NITET ALVA & ORS.

..... Appellants

Through : Mr. Gopal Subramaniam, Sr. Advocate, Mr. Sandeep Sethi, Sr. Advocate with Mr. Prateek Jalan, Mr.S. Sanatanam Swaminadhan and Ms. Kartika Sharma, Advocates

Versus

TURNER ASIA PACIFIC VENTURES INC.

..... Respondent

Through : Mr. Rajiv Nayar, Sr. Advocate with Mr. Rishi Agarwala, ms. Malavika Lal, Advocates

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. The appellants challenge an order of the learned Single Judge dated 24.09.2012 in a contempt proceeding, i.e. CCP 230/2012; the order directed them to deposit US\$ 1.5 million in Indian Rupee equivalent, at the prevailing rate when the scheme for amalgamation was approved by a learned Company Judge of this Court, within six weeks.

2. The brief facts are that the third appellant (hereafter called “RLB”) is the transferee company in terms of a Scheme of Amalgamation (“the Scheme”) finally sanctioned by the Company Judge (a learned Single Judge of this Court) on 29.03.2011. The scheme was approved with effect from the appointed day, i.e. 01.07.2010. In terms of the same, RLB became owner of the undertaking of M/s Turner Asia Pacific Ventures Incorporated, i.e. the respondent (also the contempt petitioner; hereafter referred to as “the petitioner company”). The appeal has annexed a copy of the approved Scheme between the Transferor company and RLB. The respondent approached this Court in a Civil Contempt proceedings complaining of deliberate and willful violation of the Court’s order dated 29.03.2011. The respondent’s argued that an amount of US\$ 1.5 million was payable to it in terms of Clause 4 of the scheme of amalgamation and despite lapse of considerable time, that condition had not been complied with, deliberately. By the impugned order, a learned Single Judge noticed the contentions of the parties as well as Clause 11.1 (of the scheme of amalgamation) – under which amount of US\$ 1.5 million was to be paid to the respondent. The impugned order also took note of the submission on behalf of the alleged contemnors, i.e. present appellants, and issued directions which are impugned in the present case.

3. The relevant extracts of the discussion by the learned Single Judge and the impugned directions are in the following terms:

“Mr. Nayar, learned senior counsel, on instructions, submits that respondent no.4 may be deleted from the array of parties.

The said statement is taken on record. Respondent no.4 is deleted from the array of parties.

Mr. Nayar, learned senior counsel, referred me to the order dated 29.03.2011 passed by this court in Company Petition No.20/2011 alongwith Company Application No.220/2010.

Mr. Nayar, submits that in terms of clause 11.1 of the scheme of amalgamation, the respondents were required to pay a sum of US \$ 1.5 Million to the petitioner in consideration of cancellation of 10,000 equity shares of a face value of Rs.10/- each held in the petitioner’s company.

Mr. Nayar also has drawn my attention to paragraphs 6 and 18 of the compliance affidavit filed by the respondent, wherein the following averments have been made:-

“..the respondents have not paid the amounts as they await approval from the concerned authorities....”

“.....It is admitted that the Court had directed that an amount of USD 1,500,000 be paid to the petitioner towards cancellation of 10,000 equity shares and all the preferential shares held by the petitioner in the said company. It is reiterated that the respondents have not been able to pay in view of the circumstances stated above which are not repeated for the sake of brevity and the same may be read as part and parcel of the reply to the answering para....”

On the other hand, Mr. Swaminadhan submitted that apart from the fact that money has not been remitted to the

petitioner since the necessary approval from RBI has not come through, the other reason which dissuaded the respondents was the discovery of the fact that the petitioners had failed to comply with their reciprocal obligations under the scheme, which includes their obligation to supply codes of the set up boxes and transmission equipment. Mr. Swaminadhan says that this deliberate inaction on the part of the petitioners has resulted in a situation where the respondents today are left with a company which is quite useless for its purposes.

Mr. Swaminadhan further submits that the company is a loss making company and is totally bankrupt.

I am not impressed with the assertions made by Mr. Swaminadhan. Suffice it to say that an obligation has been undertaken by the respondents before this court, which requires compliance. In the event the petitioners are required to fulfill any reciprocal obligations, as contended by the respondents, the very least that the respondents ought to have done by now, was to take recourse to an appropriate remedy, in accordance with law. Admittedly, no steps have been taken in that behalf, though the direction to deposit flows from a judgment dated 25.03.2011. As regards the submission made by the respondents, qua their purported inability to pay, no demonstrable, legally recognized steps have been taken in that regard.

In these circumstances, for the moment, I propose to issue a limited direction, which is, that respondents will deposit US \$ 1.5 Million, in Indian rupees, in court, at the rate of exchange which was prevalent on the date of the judgment, within six weeks from today. On the money being deposited, the same shall be invested in an interest bearing fixed deposit with a nationalized bank, by the registry. The

release of the money, if deposited, would await the approval of the RBI and further orders of this court.

List on 16.01.2013.”

4. The appellants argued that the impugned order facially discloses several errors, the most obvious one being that the question of payment was dependent on the fulfillment of reciprocal obligations of the various parties under the scheme of amalgamation. The question whether RBL had defaulted in making the payment could not be considered in isolation but had to be seen in the totality of the circumstances, including the pleadings and submissions made. The appellant’s Senior Counsel argued that a bare reading of the affidavit filed pursuant to the learned Single Judge’s earlier directions disclosed that the aspect of non-compliance with the obligation, as regards vesting of undertaking, had been specifically urged. This necessitated at least an enquiry. Under these circumstances, the Court could not have prejudged the issue and directed payment of US\$ 1.5 million. Even otherwise, argued learned senior counsel, the Court could not have exercised contempt jurisdiction since the dispute required full enquiry and trial as to the *inter-se* obligations of the parties. Learned senior counsel relied upon clause 1.1 of the Scheme and para 4, in the formal order of the Court dated 29.03.2011. Clause 1.10 of the Scheme defines “undertaking” as follows:

“1.10 “Undertaking” shall mean and include the following:

(a) All the assets, whether movable or immovable, tangible or intangible, properties, current assets, investments, claims, authorities, allotments, approvals, consents, licenses, registration, contracts, engagements, arrangements, estates, interests, intellectual property rights, powers, rights and titles, benefits and advantages of whatsoever nature and wherever situate of every description belonging to or in the ownership, goodwill, power or possession and in the control of or vested in or granted in favor of or enjoyed by the Transferor company as on the Appointed Date(hereinafter referred to as “the said assets”) and;

(b) All the present and future liability and debts, duties, liabilities and obligations of every description, or pertaining to, the Transferor Company, whether secured or unsecured, as on the Appointed Date (hereinafter referred to as “the said liabilities”)

Without prejudice to the generality of the foregoing, the term “Undertaking” shall include the entire business of the Transferor Company which is being carried out under the trade name of “Real Global Broadcasting Private Limited” and shall include advantages of whatsoever nature, agreements, allotments, approvals, arrangements, authorizations, benefits, capital work-in-progress, concessions, rights and assets, industrial and intellectual property rights of any nature whatsoever and licenses in respect thereof, intangibles, investments, leasehold rights, liberties, patents, permits, powers of every kind, nature and description whatsoever, privileges, provision funds, quota rights, registrations, reserves, and all properties, movable and immovable, real, corporeal or incorporeal, wheresoever situated, right

to use and avail of telephones, telexes, facsimile connections, installations and other communication facilities and equipments, tenancy rights, titles, trademarks, trade names, all other utilities held by the Transferor Company or to which the Transferor Company is entitled to on the Appointed Date and cash and bank balances, all employees engaged in the Transferor Company at their respective offices, branches at their current terms and conditions, all earnest moneys and/or deposits including security deposits paid by the Transferor Company and all other interests wheresoever situate, belonging to or in the ownership, power or possession of or in the control of or vested in or granted in favor of or enjoyed by or arising to the Transferor Company.”

Para 4 of the Court’s order dated 29.03.2011 reads as follows:

“4. As per clause 11.1 of the Scheme, upon the scheme becoming operative, in consideration of the transfer and vesting of the undertaking in the Transferee Company in terms of this Scheme, all shares of the Transferor Company shall be cancelled and while the shareholders of the Transferor Company, i.e. Turner Asia Pacific Ventures Inc. and Alva Brothers Entertainment Private Limited, shall not receive shares in the Transferring Company in consideration of the cancellation of the shares of the Transferring Company, the consideration to the shareholders of the Transferor Company shall be paid as under:

- (a) USD 1,500,000 (US Dollar One And Half Million only) to Turner Asia Pacific Ventures Inc. towards consideration of the cancellation of 10,000 (Ten*

Thousand) Equity Shares of Rs.10/- each held by Turner Asia Pacific Ventures Inc.

(b) Towards consideration of the cancellation of the shares held by Alva Brothers Entertainment Private Limited, Transferor Company merges into a wholly owned subsidiary of Alva Brothers Entertainment Private Limited; and”

5. It was submitted that apart from non-compliance on part of the petitioners in regard to its obligations, the appellants, particularly the transferee company had no intention of resiling from its commitments. It was submitted that the amount (of US\$ 1.5 million) could not be released without sanction by the Reserve Bank of India (RBI) – a fact which is both pleaded and urged before the Single Judge. Learned counsel further emphasized that the documentary evidence in this regard conclusively pointed to the transferee company's *bona fides* which could not have been ignored in the impugned order. Learned counsel lastly submitted that the question of non-compliance (as regards the obligations cast upon the respondent was concerned) could not be taken out of context and had to be considered. Such being the case, the controversy was not capable of adjudication in contempt jurisdiction. Learned counsel emphasized that an application under Section 392 of the Companies Act (C.A. No. 2076/2012, in C.P. 20/2011) had been moved before the learned Company Judge, alleging that the respondent had not complied with the terms of the Scheme as a result of which the amalgamation order had to be withdrawn or cancelled.

6. The respondent's counsel urged that the appellants did not dispute their liability in terms of the orders of the Court which had sanctioned the Scheme of Amalgamation. Clause 4 specifically cast a duty on them to pay the sum of US\$ 1.5 million, which, concededly, had not been made. For these reasons, there was every justification for invoking the Court's power of taking suitable action against the appellants, particularly the third appellant, for violation of the Court's order. It was submitted that even though the appellants now argue that the respondent's obligations remained unfulfilled, and are now seeking to rely upon correspondence and letters and other documents, with a request for entertaining such additional evidence for the first time, no such plea was advanced before the learned Single Judge. All that the impugned order does, submitted learned senior counsel, is to direct deposit of US\$ 1.5 million in Court; the same was to be subject to the final orders to be made in the contempt proceedings. Consequently, the appellants cannot claim to be aggrieved by the order of 24.09.2012 since it did not conclusively determine the rights and liabilities of the parties. Learned senior counsel for the respondent also urged that so far as the application for directions under Section 392 is concerned, the appellants chose to approach the Company Court in November after the impugned order, and that this Court should not in any manner be influenced by such later development.

7. It can be seen from the above discussion that the contempt petitioner, i.e. the respondent in this case is aggrieved by the non-

payment of US\$ 1.5 million – the amount which had to be received by it pursuant to the scheme of amalgamation being sanctioned by this Court's order. The appellants who were directed to ensure the deposit of that amount urged that such obligation cannot be seen in isolation, and that the respondent was under a reciprocal obligation to ensure that the entire undertaking fully vested with them. It was also urged that the appellant's do not have any intention of violating the Court's order and have sought for RBL's permission to remit the amount. Certain documents are relied upon. It was also urged that the appellants have sought for appropriate directions in view of the alleged non-compliance which is part of the bargain in terms of the scheme of amalgamation sanctioned by the Court. The respondents, on the other hand, urged that this Court should refrain from exercising its appellate jurisdiction since no final order has been made and that concededly the amount required to be paid was, in fact, never paid, thus disclosing violation of the Court's order calling for exercise of contempt jurisdiction.

8. This Court notices that the contempt proceedings were initiated with the issuance of notice by the learned Single Judge, by order dated 13.04.2012. At that stage, the appellants (arrayed as alleged contemnors), were not heard; on that very first date of hearing while issuing notice *ex-parte*, the Court directed the present appellants to “*comply with their obligation contained in the sanction order dated 29.03.2011, passed under Section 394 of the Companies Act in Company Petition No.*

20/2011...”. On the very next date of hearing, the impugned order requiring deposit of US\$ 1.5 million was made. The impugned order no doubt noticed the submission on behalf of the appellants that the respondent failed to comply with the reciprocal obligations under the scheme which included their obligations to provide set-top boxes and transmission equipment. However, learned Single Judge was unimpressed with the submission; he reasoned that if the appellants’ arguments were sound, they would have sought recourse to appropriate remedies in accordance with law. He noticed that no steps had been taken in that behalf despite the Court’s order sanctioning the scheme on 25.03.2011.

9. The previous discussion would reveal that the appellants have approached the appropriate forum, i.e. Company Judge and sought for directions under Section 392, alleging that the respondent had not complied with their part of the obligations under the sanctioned scheme of amalgamation. This Court also notices that the impugned order, directing payment of US\$ 1.5 million and also overruling the appellant’s submission with regard to the non-fulfillment of the respondent’s obligations was narrowly premised upon the appellants not having sought appropriate remedies in accordance with law for such alleged non-compliance. In these circumstances, this Court would *in effect* be a Court of first instance in discerning whether such reciprocal obligations were indeed complied with and if not, whether that justified the appellants’

withholding payment of the said amount of US\$ 1.5 million. The inappropriateness of such course is highlighted by the fact that the proper forum, i.e. the Company Judge, before whom identical allegations have been leveled against the respondent, is now seized of an application under Section 392 of the Company Act. The subject matter of those proceedings would properly be the question of interpretation and implementation of the Scheme of amalgamation sanctioned by the Court in its order dated 29.03.2011. In view of this circumstance, this Court is of the opinion that it would be singularly inappropriate to enter into an enquiry as to whether the respondent did or did not fulfill its obligations as to justify the appellants' withholding the amounts in question. Consequently, this Court directs as follows:

- (1) The operation of the impugned order dated 24.09.2012 shall be kept in abeyance to await the decision of the learned Company Judge in C.A. 2076/2012 (in C.P.20/2011) filed by the present appellants;
- (2) The learned Company Judge seized of the said application (C.A. 2076/2012) is requested to hear the parties and dispose of the said application at her earliest convenience. For this purpose, learned counsel for the parties shall be present before the learned Company Judge on 23.11.2012. Apparently, the said application has been listed for further proceedings on 16.01.2013; the learned Company Judge is requested to take-up the matter according to the Court's earliest convenience and

proceed with the application and decide it as expeditiously as possible, and if possible, within three months from today.

(3) The parties are directed to approach the learned Single Judge seized of CCP.230/2012, immediately after the decision in C.A.2076/2012.

10. The learned Single Judge hearing the contempt proceeding shall then proceed to make such appropriate order as the circumstances may require, having regard to the order of the learned Company Judge in C.A.2076/2012.

11. All rights and contentions of the parties are expressly reserved. This order shall not be construed as an expression on the merits of the submissions made on behalf of either of the parties. The appeal is disposed of in the above terms. All the pending applications also stand disposed of. Order dasti to the parties.

S.RAVINDRA BHAT, J.

16.11.2012

CHIEF JUSTICE